NO. 12,422

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

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JURISDICTION

This action was brought by the appellee, the United States of America, hereinafter called the "Government," against appellant, Lomax Transportation Company, which is and was liable for all duties, obligations and contracts of the Lomax Fireproof Warehouses, Inc., which on or about April 22, 1946, had changed its corporate name to Lomax Transportation Company, a corporation. The corporations were and are citizens and residents of the State of Washington. Appellant is hereinafter called the "Warehouse Company". The action was predicated upon a certain printed form contract covering the storage of certain Naval supplies belonging to the Government for a period beginning October 2, 1944, and ending June 30, 1945, in the warehouse of the Warehouse Company in Spokane, Washington, and for fire losses and damage to said stores in the sum of $16,415.87, sought to be proved by a certified copy of Certificate of Settlement of the General Accounting Office, Form 2042 (Revised).

The controversy was, therefore, a controversy which at the time of the commencement of the action was and still is between the United States of America as appellee and a citizen of the State of Washington as appellant on a contract drawn by the former, and the amount in controversy is and was at the time of the commencement of the action in excess of $3,000.00, and involves the construction of certain Federal Statutes which became effective September 1, 1948, including Chapter 646, Public Law 773, Sections 38 and 39, 80th Congress (Title 28 U.S.C.A., Judicial Code, Section 1733).

Jurisdiction of the District Court existed under Section 41, Title 28 U.S.CA., Judicial Code, Section 24 amended. The

appeal to this Court is from the final judgment decreeing that appellee, plaintiff below, have judgment against appellant, defendant below, in the sum of $16,415.87 with interest at the rate of 6% from September 6, 1949, and from an order denying defendant's alternate motion for judgment notwithstanding the decision and for a new trial entered the 13th day of October, 1949. Notice of appeal was filed in the Office of the Clerk of the District Court on the 4th day of November, 1949, and jurisdiction is believed to exist under Section 225 (a) and (d) Title 28 U.S.C.A. and (d) Title 28 Section 225 (a) and (d) Title 28 U.S.C.A., Judicial Code, Section 128 amended. (Tr. 57 to 59).

STATEMENT OF THE CASE

On October 2, 1944, the Lomax Fireproof Warehouses, Inc., a Washington corporation, agreed to store certain Naval supplies belonging to the United States Government for a period beginning October 2, 1944, and ending June 30, 1945, in its warehouse at 124 S. Wall Street in Spokane, Washington. A printed form contract designated as S and A Form 102 (Revised 1943) was used as the instrument outlining the rights and duties of the parties. (Ex. 1, Tr. 8-28). This printed form of contract was usually used for the procurement of supplies, but in this case the Government sought to adapt it to the leasing of warehouse space. A Naval scriviner apparently without any legal training (Ex. 1. Stipulation of Dec. 8, 1950) typed in a special provision reading as follows:

> "4. SPECIAL PROVISIONS. A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws."

and the appellant Warehouse Company signed the contract (Tr. 91, 92) believing it was to be held to a warehouseman's liability under existing warehouse laws of the State of Washington. The Government would transfer its Naval stores at the Velox Depot outside the City of Spokane to the warehouse of the appellant in Spokane and each time receive a warehouse receipt (Tr. 93) specifically providing in part concerning the liability of the Warehouse Company as follows:

> "Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following

terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.

"The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93)

On December 26, 1944, a fire occurred in the warehouse which resulted in the destruction of certain Naval stores. (Tr. 79). A short time after the occurrence of the fire, a Navy Board of Inquiry investigated the causes and found there was no apparent negligence on the part of the Warehouse Company and further that recovery from the appellant Warehouse Company should be limited to the appellant's legal liability under existing warehouse laws of the State of Washington. (Tr. 95, 96, Ex. 1). Appellant Warehouse Company carried insurance against damage by fire resulting from its negligence. (Tr. 82). This type of insurance was the kind customarily carried by warehousemen in Washington. (Tr. 82). The Warehouse Company when it signed the prnted form contract, (Ex. 4) understood that the legal consequences thereof would be that it would only be responsible for the exercise of ordinary diligence and care and would not be responsible for loss and damage to goods caused by fire, Act of God or other causes beyond its control. (Tr. 91, 92). No proof of any negligence on the part of the Warehouse Company was submitted by the Government, but it sought to prove its damages by a Certificate of Settlement of the General Accounting Office (printed form 2042) (Ex. 3) without offering any proof as to the correctness of the figures thereon or as to how they were arrived at by anyone who had anything to do with the salvage of the

Naval stores or the preparation of thecertificate. (Tr. 71-76). This Certificate of Settlement stated the total amount due the United States to be $16,415.87, for which sum the trial court entered judgment against the appellant. It was apparently the theory of the trial court that no mistake or ambiguity existed in the contract and that the Certificate of Settlement was competent proof of the damages sustained. (Ex. 6). (Tr. 107).

SPECIFICATIONS OF ERROR

1. The District Court erred in denying defendant's motion to dismiss plaintiff's complaint, which order was signed and filed December 9, 1947.

2. The District Court erred in granting plaintiff's motion to strike in part paragraph III of defendant's amended answer, which order was signed and filed April 7, 1949.

3. The District Court erred in refusing to admit in evidence the findings of fact of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws, and that there was no apparent negligence on the part of the defendant. (Plaintiff's Ex. 1. Tr. 96).

4. The District Court erred in admitting and considering in evidence over defendant's objection the Certificate of Settlement of the General Accounting Office (Plaintiff's Ex. 3) for the purpose of providing that the Government sustained damages and the amount thereof. (Tr. 73-76).

5. The District Court erred in denying defendant's motion for a non-suit and for a dismissal of the complaint on the ground of a total failure of proof as to any damages sustained by plaintiff. (Tr. 76).

6. The District Court erred in rendering and entering the final judgment in the su mof $16,415.87. (Tr. 52, 53).

7. The District Court erred in denying defendant's alternative motion for judgment nothwithstanding the decision and for a new trial. (Tr. 55, 56).

ARGUMENT

I.

WAREHOUSEMAN'S LIABILITY UNDER THE CONTRACT

Specifications of Error 1 to 3 deal with what appellant conceives to be the wrongful interpretation by the Trial Court of the contract, and for the convenience of the Court, we will discuss these specifications together.

Warehouse Company Not an Insurer

Appellant was a warehouse company although the District Court coustrued the contract to make the appellant an insurance company. At common law, in the absence of special agreement, a bailee such as the appellant Warehouse Company was not an insurer nor "absolutely responsible" for goods in its custody. See *Mill Factors Corp. vs. Ming Toy Dyeing Co.,* 41 *F. Supp.* 467. Such liability was not enlarged by the Washington statute providing for warehouseman's liability, which is as follows:

> "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care." *Remington's Revised Statutes* §3607.

The District Court in effect construed this contract to be one of insurance rather than one for warehousing.

For a better understanding of this effect, we would refer to the definition of "insurance," as set forth in *In Re Knight's Estate*, 31 *Wn.* (2d) 813 *at* 816, 199 P. (2d) 89.

Printed Contract Did Not Make Warehouse Company Insurer

The contract itself in Article 10 thereof provided in part:

> "the Contractor shall not be charged with any liability for failure or delay in delivery or performance when such failure or delay is due to causes beyond the control and without the fault or negligence of Contractor, including but not restricted to (1) acts of God or of a public enemy, (2) acts of the Government of the United States or any State or political subdivision thereof, (3) fires ****" (Tr. 17, 18)

Certainly the use of this language does not indicate the intention to impose an insurer's liability.

Effect of Typewritten Provision 4. A.

The printed contract had a special typewritten provision 4. A. that reads as follows:

> "4. Special Provisions.
>
> A. Contractor assumes absolute responsibility for property in his possession and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws." (Tr. 20)

As near as can be ascertained from the record, this was dictated by one C. T. McCormack, Jr., who signed the letter of transmittal accompanying the printed contract, which did not appear on the photostatic copy offered by the Government (Tr. 78), but does on the original document (Defendant's Ex. 4). If McCormack was the scrivener, it is undisputed that his personnel officer qualifications show that he had no legal training. (Tr. 61 and Stipulation December 8, 1949, relating to defendant's Ex. 1). The District Court held that the effect of this typewritten clause was to make the Warehouse Company an insurer. Was this a proper construction? We are not favored with the Court's

reason for his holding in his short memorandum opinion: Whether he believed as a matter of law that the written contract under no circumstances could be reformed because there was no testimony that the scrivener McCormack (whom the Government never called) was mistaken or whether the Court did not believe appellant's testimony (which was the only testimony on the point) that, as a matter of fact, that all that was intended to be imposed was a warehouseman's liability. (Tr. 107).

Admittedly, the special typewritten provision 4. A. itself was only made ambiguous by the use of the single word "absolute". But was even this intentional? The District Court refused to consider the evidence that by operating under warehouse receipts provided for in 4. Special Provisions C. of the contract, the Supply Officer in Command of the Navy Supply Depot and the Warehouse Company in fact interpreted the contract themselves as one under which the appellant could only be held to a warehouseman's liability under the Washington Warehousing Laws. The District Court apparently disregarded testimony on the part of the appellant that all that was meant by the parties was to hold the appellant to a warehouseman's liability under the Laws of the State of Washington. (Tr. 91, 92) J. M. Lomax, President of the Warehouse Company testified:

> "Q. Did you—well, to put it bluntly, did you read this contract before you signed?
>
> "A. Well, I did not read it, because I supposed it was the same as all other government contracts, and I signed a lot of contracts, and I didn't suppose the government would bring any thing that was different from the Washington state laws.
>
> "Q. Well, what I'm getting at, was there any discussion by you with anyone in the Navy or United

States Government or anywhere else about the typed portions of that contract?

"A. No, definitely not." (Tr. 92)

If an insurer's liability would result from the use of the single word "absolute" such a result under this evidence was a mistake and the contract should be reformed.

Rules of Contractual Construction

Irrespective of his reasons. the District Court by all the rules of interpreting the scope and meaning of contracts should not have construed the 4. A. clause to impose an insurer's liability. To do so he had to treat that whole second portion of the paragraph after the word "possession" reading "and shall maintain Bond and Insurance at his own expense in accordance with the State of Washington Warehousing Laws" as mere surplusage, so that the clause would read according to the Court's interpretation: "Contractor assumes absolute responsibility for property in his possession."

Contract To Be Construed as a Whole

At the onset it would be well to consider several general principles which were perhaps not sufficiently emphasized to the District Court. A contract is construed as a whole and so as to give effect to all of its parts. 17 *C.J.S. Contracts* §297, *page* 707. 3 *Williston on Contracts* (*Revised Edition*) §618, *page* 1779. As we have pointed out, Article 10 of the printed contract provided that the "Contractor" [Warehouse Company] was not to be "charged with any liability for failure . . . . when such failure . . . . is due to causes beyond the control and without the fault or negligence of contractor . . . . [Warehouse Company] (Tr. 18). In addition to the above portion of the phraseology of Article 10, the contract also contains the following Special Provision 4. C. reading:

> "The contractor shall furnish to the Supply Officer in Command, Naval Supply Depot, Spokane, Washington, *Bonded Warehouse Receipts* for all materials in storage," (Italics ours), (Tr. 21)

The "Bonded Warehouse Recpeits" used read as follows:

> "Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 Wall Street, Spokane, Washington.
>
> "The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93).

All these parts of the contract, to say nothing of the latter part of paragraph 4. A. itself would be meaningless if the contract were construed to impose an insurer's liability.

Contract Was for Warehousing and Not Insurance

Secondly, one of the main purposes of the contract was to provide:

> "For necessary services as may be required for the balance of the fiscal year 1945, beginning 2 October 1944 and ending 30 June 1945, in connection with *warehousing* Navy stores." (Italics ours). Article 10.

Appellant's Interpretation Reasonable

Again, a contract should be interpreted so that it shall be effective and reasonable. 3 *Williston on Contracts (Revised Edition)* §620. It is unreasonable and unfair to suppose that a warehouse company which had a certain type of insurance coverage would of itself assume an insurer's liability when the services and materials to be performed and fur-

nished were unknown. The contract itself specifically provides in Article 10, sub-section 1:

> "Such services and materials, including, but not by way of limitation, warehousing space **** as required."

and again under the caption "UNCERTAIN AND VARYING NEEDS OF THE NAVY":

> "The uncertain and varying needs of the Navy (or Government) make it impossible to determine the quantity or quantities of the articles and material described herein that may be required during the contemplated period of the contract. *****"

Even if the insurance laws had permitted it, the appellant would not have undertaken an insurer's risk at the contract rate. Obviously it could not have covered itself by insurance for "absolute responsibility" except at prohibitive rates. This cost it could have been expected to include in the contract rate charged the Government. The Government recognized this and the Navy had simply adopted a policy of self-insurance for the purpose of keeping down its contractual costs. See *Naval Regulations, Volume* 1, *Bureau of Supplies & Accounts Manual, Art.* 1061 3. (g).

Contract Was Drawn by Government

In the fourth place, if the use of the single word "absolute" in Special Provision 4. A. renders the contract's meaning ambiguous, the language of the contract should be interpreted more strongly against the party using it. 3 *Williston on Contracts (Revised Edition)* 621. The ambiguous word "absolute" was apparently drafted by one C. T. McCormack, Jr., (letter of transmittal, Defendant's Ex. 4), a scrivener unversed in the law, as shown by the record of McCormack himself indicating that he was an assistant supply officer who was neither a legal officer nor legally

trained. (Plaintiff's Ex. 1 and Stipulation Regarding Making Document part of Exhibit "1"). Whether McCormack's mistake was one of fact or of law should make no difference. The rule itself which distinguishes mistake of law from mistake of fact is founded on no sound principle. The Federal Courts have recognized the difficulty of coordinating all the cases so as to produce satisfactory results. See *Clifton Mfg. Co. v. United States,* 76 *F.* (2d) 577 *at* 579. As one text writer has stated:

> "There is no portion of the law of mistake more troublesome than that relating to mistake of law, by which is meant either ignorance of rule or principle of law or an erroneous conclusion as to the operation of law upon a known set of facts." *Williston on Contracts* §1581.

EXISTING LAW IS PART OF CONTRACT

In the fifth place, existing laws always form a part of a contract. 3 *Williston on Contracts* (*Revised Edition*) §615. Here there were positive Naval Regulations indicating that the Government would have no right to enter into a contract *for insurance* of Naval stores and that the Navy itself was a self-insurer. By Pre-Trial Order of April 1, 1948, the Trial Court should have taken judicial notice of any pertinent portion, provision or article of that official publication of the Navy Department known as the Bureau of Supplies & Accounts Manual, which provided in part as follows:

> "The Navy Department has adopted a general policy of self-insurance, under which it assumes the risk of loss or damage to Government-owned property in the hands of contractors. Pursuant to this policy, uniform insurance provisions have been inserted in the Gorernment-furnished material clause and the advance and partial payment clauses. Field purchasing officers will not include *any other insurance provisions* in contracts

without the approval of the Bureau of Supplies & Accounts and the Assistant Secretary of the Navy, Material (Procurement Branch, Insurance Section." (Italics ours)

Captain J. M. Ball, Supply Officer in Command, had no authority to impose the absolute liability of an insurer upon the appellant Warehouse Company as the District Court construed the contract. Such a construction by the Trial Court that the Supply Officer could impose an insurer's liability in effect was a holding contra to the self-insurance provisions and the provision for the necessary approval of the Bureau of Supplies & Accounts and the Asssistant Secretary of the Navy, Material Division (Procurement Branch, Insurance Section). Another portion of the Naval regulations, Section 1, specifically holds that variations in the general provisions will not be made except when authorized by the Bureau of Supplies & Accounts and no such special authorization was ever pleaded or proved by the Government in the case at bar. To interpret the contract as the District Court did to impose an insurer's liability on what the contract itself called the "uncertain and varying needs of the Navy" would be to interpret the contract as a wagering contract in contravention to public policy and permit any company including the appellant Warehouse Company to become an insurer without submitting to the regulations of insurance companies in the State of Washington, the Supreme Court of which has recently held:

" 'Insurance', in its general sense, may be defined as an agreement by which one person, for a consideration, promises to pay money or its equivalent, or to perform some act of value, to or for the benefit of another person, upon the destruction, death, loss, or injury of someone or something as the result of specified perils. 29 Am. Jur. 47, Insurance, §3; 44 C.J.S. 471, Insurance, §1; 1

> Joyce, Law of Insurane 73, §2. In §.01.04, p. 189 of the present insurance code of the state of Washington, Laws of 1947, chapter 79, p. 189, 'insurance' is defined as a *contract* whereby one undertakes to indemnify or pay a specified amount to another upon determinable contingencies." *In Re Knight's Estate,* 31 *Wn.* (*2d*) 813 *at* 816, 199 *P.* (*2d*) 89.

CONDUCT AND ACTS OF PARTIES

Finally, an interpretation given by the parties themselves will be favored. 3 *Williston on Contracts* (*Revised Edition*) §623. Assuming arguendo that the use of the word "absolute" in 4. A. could impose an insurer's liability, the parties themselves never operated on that principle. Warehouse receipts were provided for in 4. SPECIAL PROVISIONS. C. of the contract. These were furnished for all the vast amount of goods stored and these warehouse receipts specifically provided in part concerning the liability of the appellant company as follows:

> "Received for the account of Naval Supply Depot, Velox, Washington for storage, the goods or packages enumerated in the schedule below, upon the following terms and conditions, said goods stored in warehouse located at No. 124 S. Wall Street, Spokane, Washington.
>
> "The Company will be responsible for exercise of ordinary diligence and care, but not responsible for ordinary wear and tear in handling, nor for loss or damage to said goods caused by moth, fire, rust or deterioration, Acts of God, or other causes beyond its control." (Ex. 11, Tr. 93).

The District Court was apparently unimpressed by the interpretation given the parties themselves as shown by the multitude of goods delivered pursuant to this warehouse receipt form. Not only these acts, but the declaration of the parties themselves should have been considered, such as the testimony of Jesse Lomax that a legal officer of the Navy

informed Captain Ball in his presence that the appellant Warehouse Company could only be held for negligence. (Tr. 96). The conduct and declaration of the parties may always be evidence of the subsequent modification of their contract. Yet the Trial Court refused to admit in evidence the findings of the Naval Board of Inquiry to the effect that recovery from the contractor under his insurance would be limited to his legal liability under the existing Washington Warehouse Laws and that there was no apparent negligence on the part of the appellant. (Plaintiff's Ex. 1, Tr. 96)

II.

NO COMPETENT PROOF OF DAMAGE

Specifications of Error 4, 5, 6, and 7 deal with what appellant conceives to be the error of the Trial Court in holding that the Government had produced competent proof of damages. The Government did not offer any Navy personnel who salvaged the damaged stores or any other employees, agents or officials of the Government who took part in such salvage. While the contract did not provide for salvage by the Navy as such in case of fire, Article 10 thereof, which provided that the contractor would not be charged for fire loss without negligence, contained a provision to the effect that the contractor (the party in the same position as the appellant Warehouse Company) should notify the Navy (or Government) of the cause of "such excusable failure" to procure materials. The Government was notified of the fire and shortly thereafter requested the right to salvage and this right was granted by the appellant Warehouse Company. (Tr: 81, 84). The Navy brought its own crew in and the salvage operations took place under armed guards. (Tr. 84). Appellant Warehouse Company had no part in

these salvage operations and the goods were removed by the Navy as they were salvaged, (Tr. 84), without any accounting made to appellant Warehouse Company at that time.

There was no provision in the contract for salvage and the only part thereof that had even the remotest reference to procedure on loss was Article 10 of the contract, which stated in part that:

> —"Promptly on receipt of such notice, the contracting officer shall ascertain the facts and extent of the failure or delay, and if he shall find that the failure or delay was occasioned by causes beyond the control and without the fault or negligence of the Contractor, he shall accordingly extend the time of delivery or performance or otherwise revise the delivery schedule. The finding of fact of the contracting officer shall be final and conclusive, ***" (Tr. 19)

A Naval Board of Inquiry shortly thereafter made a finding of no negligence, the fire being of unknown origin. (Plaintiff's Ex. 1, Tr. 96). Thenceforth the Warehouse Company had nothing to do with the goods and was not apprised of any claim by the Navy until February 2, 1945. (Defendant's Ex. 5). However, from time to time it received interim reports in varying and increasing amounts as to the amount of the damages. (Defendant's Ex. 6-7). After the second claim, which was for $12,270.35, as of April 7, 1945, appellant referred to its insurer this claim of the Naval Supply Depot which was subsequently rejected on May 3, 1945. (Defendant's Ex. 8).

At the trial the Government's claim amounted to $16,415.87. To prove this claim the Government did not offer any Navy personnel who salvaged the goods, any employee, agent or official of the Government who could testify

as to the correctness of the figures or how they were arrived at, but simply offered in evidence a certified copy of a so-called "Certificate of Settlement" of the General Accounting Office under date of November 12, 1946, which stated in part that the appellant Warehouse Company was indebted to the United States in the sum of $16,415.87 as shown by a statement on the back of said Certificate. (Plaintiff's Ex. 3, Tr. 4). No individual, agent or employee of the General Accounting Office was produced to testify as to the correctness of such statement or how the figures were arrived at by anyone who had anything to do with the salvage of the Naval stores and the preparation of the Certificate. No books or records of the Navy Department, Bureau of Supplies and Accounts, General Accounting Office or any other branch of the Government or copies thereof were offered.

Obviously during the salvage operations appellant Warehouse Company had no opportunities to examine the property or determine the nature and extent of the damage and it has never been given an opportunity to have its representatives examine into any of those features. Nor has any representative of the Government with any personal knowledge of the facts been presented for cross examination as to these facts. Presumably the General Accounting office received reports from some source containing statements of someone conversant with these facts. Not even these reports which might have probative value as to the kind and quantity of the property stored and removed, and as to the physical facts concerning the nature and extent of damage were offered. Presumably the records of some office in the Navy department or the General Accounting office might have shed light on the value of the various items

of property, based upon their cost to the Government, but none were ever offered by the Government.

The appellant Warehouse Company admitted the authenticity of Exhibit 3, but objected to its competency as evidence of damage. Thus the principal question before the Court on this phase of the case is whether the "Certificate of Settlement" is a competent document with which to prove damages. It is, of course, patent that such Certificates could not be cross-examined. The question of admissibility of this Certificate for the purpose of proving the fact that the Government sustained a fire loss damage and the amount thereof is controlled by either 28 *U.S.C.A.* 1732 or 1733 of the new Judicial Code, which became effective September 1, 1948, during the pendency of the case at bar. The former controlling sections were 28 *U.S.C.A.* 661 and 665, which were repealed by Act June 25, 1948, C. 646, Sec. 39.

COMPARISON OF 28 U.S.C.A. 1732, 1733 WITH OTHER STATUTES AND RULES:

However, 28 *U.S.C.A.* 661 (repealed) was the same as the new 1733 (b) and it simply provided that "properly authenticated" copies of Government papers may be admitted in evidence equally with the originals thereof.

28 *U.S.C.A.* 665 (repealed) was limited to suits against revenue officers or others accountable for public moneys. There is no similar restriction in Section 1733. *Federal Rule of Procedure* 44 as to the proof of official record following 28 *U.S.C.A.* 723c appears to remain in force.

31 *U.S.C.A.* 46 appears unaffected by the new code, but simply provides that authenticated copies of records or transcripts thereof from Comptroller General's office will be

admitted with the same effect as 28 *U.S.C.A.* 661 and 665.

31 *U.S.C.A.* 52 (*d*) and (*e*) permit a deputy to make the authentication. These sections neither add to nor detract from the new section 1733 of *Title* 28, which reads as follows:

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

The question for this Court to decide is whether Plaintiff's Exhibit 3, the Certificate of Settlement, is a competent document with which to prove damages in the case at bar.

The loss in value of the goods through their being damaged is necessarily a matter of opinion; such opinions must be supported by proper foundation under elementary rules of evidence applicable to determination of values.

But, disregarding for the present the lack of any foundation for introduction of the purported evidence of extent of damage, the introduction of the certificate to show quantity and kind of goods stored falls far short of having any support in statutes or decisions of any court.

We do not know whether it was 28 *U.S.C.A.* 1732 or 1733 upon which the Trial Court relied in admitting this certificate. If it complies with either and if either statute authorizes its admission, it has gone far beyond any rule of evidence accepted by court decisions or any previous statute

enacted by the Congress or by any state legislature. The notes of the Reviser (appearing at pp. 1701 et seq. of West Pub. Co. Cong. Service, 1948, paper ed., in connection with the Senate and House Committee Reports on the bill for revision of the Judicial Code, P. L. 773 of the 80th Congress, at pp. 1871-2) show that Section 1732 is merely a restatement of the old 28 U.S. C. Sec. 695; and that Sec. 1733 is merely a consolidation of the old Secs. 661-667 and 671 of the 1940 U.S. Code. There is no intimation that the revision broadened any preexisting rule except to include "any department or agency" of the government, instead of merely those mentioned by name in previous statutes.

However viewed this certificate was no writing or record made in the usual course of business within the "shop book rule" stated in Sec. 1732, or in any court decisions defining such rule, nor is it either a "memorandum or record of any act, transaction, accrual or event" pertinent to the case at bar. Nor is it a "book or record of account or a minute of any proceeding" pertinent to the ultimate facts here. It is mere recital, purporting to be signed by some unidentified person, (whether or not an official thereunto authorized does not appear) in the name of the Comptroller General of the United States, stating that he has examined the "claims" of the Government against the appellant Warehouse Company and finds due from the latter a specified sum under a contract for storage of navy stores, which the Comptroller General construes to impose a certain liability on appellant Warehouse Company and under which he peremptorily concludes it is indebted to the Government in the amount stated.

This Court will observe that Exhibit 3 does not on its

face state the source of a single matter of fact therein set forth. Appellant was not told from what source this information was derived. No "books or records of account or minutes of proceedings of any department or agency of the United States" are mentioned except that the Comptroller has "examined and settled the claims of the United States against the person above named ****"

The only effort made by the Government to show in any way either the quantity or description of property of the Government which was lost or damaged, or the value of property destroyed or the injury to property only partly destroyed, consisted in its introduction, over objection by the defendant, of Plaintiff's Exhibit 3. (Tr. 73-76).

Appellant is not concerned with the authenticity of this document (which is admitted) but with its competency as evidence. The authentication merely makes the photostatic copy (Plaintiff's Ex. 3) admissible as the original, but it is appellant's position that the original was not admissible and hence the authenticated copy (Plaintiff's Ex. 3) is not admissible and there has been a total failure of proof of damage by competent evidence. Proper objection as to its competency was made. (Tr. 74, 75, 76).

The basic rules of evidence must still govern the competency of Government records, and a document which on its face does not claim to be anything more than simple uncorroborated hearsay (or conclusion) has always been held inadmissible to prove damages even under 28 *U.S.C.A.* 665 statutes. This proposition is so fundamental that only a few of the older Federal cases have even had to consider this proposition.

In 1829 the case of *U. S. v. Patterson, Fed. Case* 16,008 held that a certified and authenticated statement of the various charges and credits against a supervisor of revenue was incompetent to prove the damages against him.

> "A full transcript from the books, containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or rejecting disputed vouchers, charges, etc., are indispensable to these objects; they can never be reached by the mere exhibition of the balance apparent upon an adjustment made, ex parte, by the officers of the treasury, and reported to the comptroller for his information of the amount claimed by the United States, and for which he is to bring suit; but which is the very matter complained of; the very adjustment appealed from, by the defendant. **** If a treasury certificate that such is the balance reported to be due is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretence; an useless form which might be dispensed with, and the judgment entered at once on the production of the certificate. This cannot be the intention of the law. The whole cause of controversy must be put into the possession of the court, as it exists in the treasury department; and thereupon the court and jury will pass their judgment."

The evidence in that case was introduced under the first statute (Sec. 886 of the Revised Stat.) from which 28 *U.S.C.A.* 665 was derived. The case sets forth the statement in full and is very similar to the attempt made by the Government in the case at bar with Exhibit 3.

In *Hoyt v. U. S.*, 10 *How.* 109, 13 *L.E.*, 348, in a suit against a port collector, a transcript of books of the Treasury Dept. made up from quarterly reports of the accounting officers based on defendant's own reports were held adequate to guard him against surprise; but the court said a transcript of a gross balance would be objectionable.

In *U. S. v. Hilliard, Fed. Case.* 15,368 the syllabus notes are as follows:

> "A treasury transcript to be evidenced must contain the original items of the accounts or balances admitted by the defendant in his official returns. The court can only revise the action of the Treasury by looking at the evidence by which the Treasury acted. A balance, therefore, struck by the Treasury cannot as such, be charged, and made evidence."

In 1834 it was stated by the Supreme Court in *U. S. v. v. Jones,* 33 *U. S.* 375, 8 *Peters* 373:

> "The officers of the treasury may well certify facts which come under their official notice, but they cannot certify that which does not come within their own knowledge."

In *U. S. v. Morris,* 102 *U. S.* 548, 26 *L. E.* 226, the account of a delinquent person accountable for public money is not admissible unless certified to be a *transcript* from books and proceedings of the department.

In *Harvey v. U. S.,* 97 *F.* 452 (9th Cir.) this court held a transcript from the books of the department to be "a copy of the entire account as it stands on the books"; and quotes extensively from the cases above cited and from *U. S. v. Gaussen,* 19 *Wall* 198, 211 in explanation.

The foregoing cases all relate to actions for recovery of *public money,* not to actions for the value of government *property.* The value of money need not be proved. The value of property is, however, a matter of determination from various factors and unless admitted must be proven by evidence that can be tested by cross examination or otherwise.

In an action against an Indian agent of the government, the court said:

"It may be conceded that by virtue of §886 [28 U.S.C. 665] a transcript from the books of the Treasury, showing the officers receipts and disbursements of *public money* would be sufficient to warrant a judgment against him for any balance shown by such account to be due the government. But a transcript from a book which merely shows a charge in gross against an officer for the value of public property, without describing the property, *or the method of valuation or the manner in which it came into his hands, or the disposition made of the same,* is of no value even under §886."

(*Italics ours*)

United States v. Smith

35 F. 490

In 1930 in *Mohawk Condensed Milk Co. v. U. S.,* 48 F. (2d) 682, it was held that the court would not accept certified copies as proof of correctness of figures and documents certified by a Government official receiving documents from some other official, department or commission. In that case it appeared that the Comptroller General's office obtained figures shown in notices from someone in the Federal Trade Commission, but there was no competent proof, as in the case at bar, as to who compiled the figures or how they were arrived at. However, in the Mohawk case, unlike the case at bar, evidence was offered for the purpose of showing how the Comptroller arrived at his figures, consisting of certain sheets of paper containing certain totals and summaries which the Comptroller General certified he had received from the Federal Trade Commission, without testimony in respect to the correctness of the figures or how they were arrived at by anyone who had anything to do with the preparation thereof. It was held that the documents certified by the Comptroller General were not competent proof of their contents or of the correctness of his determination.

"****There is no competent proof of this. This court

> will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department, or commission. Certification of documents proves only the document itself, and permits its introduction in evidence without further proof of identification, but such certification does not establish as a fact the correctness of the statements or figures therein contained. When there is as here a controversy concerning the correctness of the contents of such documents, such contents must be proved by the party relying thereon the same as other facts. We cannot accept the sheets certified by the Comptroller General as proof of their contents or of the correctness of his determination."

In somewhat analogous situations courts generally and this Court in particular, have been scrupulous to safeguard the rights of a defendant in an action brought by the Government based on detailed and extensive accounting which might be reflected in scores of books involving thousands of items. It is not unknown to have sold undetermined salvaged articles too cheaply. See *Greenbaum v. U. S.* 80 *F.* (2*d*) 113 *at* 121. We feel that this Court will properly exclude for lack of competency Exhibit 3 on the same basic principle that moved the United States Court of Appeals, First Circuit, in *Rugo Construction Co., Inc. v. New England Foundation Co., Inc.,* 172 *F.* (2*d*) 964 *at* 970, to hold that in a libel to recover value of a lighter which was sunk by respondent's alleged negligence, the Navy Department's Final Statement of Rented Construction Equipment was properly excluded for want of evidence as to who made the appraisal or how or on what basis it was made.

In 1947 the Second Circuit in the case of *Vanadium Corporation of America v. Fidelity Deposit Co. of Maryland*, 159 *F.* (2*d*) 105, had occasion to examine the statutes concerning the admissibility of Government records. In speaking of 28 *U.S.C.A.* 661, which has since been repealed, but which has been reenacted in substance in 28 *U.S.C.A.* 1733 (*b*), the court said at page 109:

> "But the statutes merely provide for the method of proof of the records and do not settle their admissibility in a particular case, as proving or tending to prove the truth of the matters stated in them. Since, however, they are a substitute for the appearance of the public official himself, a natural limitation, so far as they deal with observed facts, is that they must concern matters to which he himself could have testified in person. As applied here, they should refer to matters such as admissions of the parties concerning the facts in issue or official action taken and the grounds therefor. These are facts as to which the officer himself could have been subpoenaed to testify ***"

CONCLUSION

The District Court should have granted appellant's motion for dismissal of the complaint either on the ground that the contract was for a warehouseman's legal liability and not for an insurer's liability or in any event because there was a total failure of proof by any competent evidence as to any damages sustained by the Government.

Respectfully submitted,

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